Nos. 01-653, 01-657

Supreme Court, U.S.
FILED
JUN 21 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION,
Petitioner,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

ARCTIC SLOPE REGIONAL CORP., *et al.*,
Petitioners,

v.

NEXTWAVE PERSONAL COMMUNICATIONS INC., *et al.*,
Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* URBAN COMM-NORTH CAROLINA, INC., KANSAS PERSONAL COMMUNICATIONS SERVICES, LTD., AND BERTHA COFFIN IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Urban Comm-North Carolina, Inc. ("Urban Comm") and Kansas Personal Communications Services, Ltd. ("KPCS") were among the 90 entities that were awarded PCS licenses as a result of their successful bids in the original C block auctions in 1996.[2] *Amicus* Bertha Coffin is the majority stockholder and principal creditor to KPCS. Both Urban and KPCS qualified as "small businesses" under the Federal Communications Commission ("FCC") eligibility requirements for participation in the C block auctions. Urban Comm is minority-owned, while KPCS is female-owned. As such, they are just the type of small businesses that Congress sought to provide opportunities to participate in the wireless market. Both Urban Comm and KPCS filed for bankruptcy protection when they were temporarily unable to fulfill their debt payments under the promissory notes they signed to obtain their licenses. Various provisions of the Bankruptcy Code notwithstanding, the FCC cancelled *amici*'s licenses.

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[1] This brief has been financed by the *amici* with support from Gabriel Capital, L.P., which is a creditor of *amicus* Urban Comm. No counsel for any party authored this brief in whole or in part. Counsel of record for all parties have consented to the filing of this brief and letters of consent have been filed with the Clerk.

[2] Eighty-nine entities submitted winning bids in the first auction of C block licenses in March 1996. However, two of those bidders, who had won 18 licenses, could not produce the required down payment. FCC Public Notice (DA 96-716), *Entrepreneurs' C Block Auction Closes*, 1996 WL 239442, Attachment A (May 8, 1996) ("C Block Auction Results"). The FCC re-auctioned those 18 licenses in July 1996 to seven winning bidders, three of whom had not won licenses in the first C block auction. FCC Public Notice (DA 96-1153), *Entrepreneurs' C Block Reauction Closes*, 11 F.C.C.R. 8183 (July 17, 1996). So, while there were 92 winning bidders in the 1996 C block auctions, only 90 ever obtained C block licenses.

Amici are thus in a position similar to that of respondent NextWave Personal Communications Inc. ("NextWave").[3] All three C block licensees are now ready to emerge from bankruptcy upon confirmation of their respective reorganization plans. This Court's affirmance of the D.C. Circuit's opinion, which rejected the FCC's cancellation of NextWave's licenses, will allow them all to do so and finally to bring their licenses into service.

INTRODUCTION AND SUMMARY OF ARGUMENT

Electromagnetic spectrum is a scarce and valuable asset, and its price obeys the law of supply and demand and other market forces. Congress sought to capitalize on this reality in 1993 when it determined to allocate spectrum through a process of competitive bidding. The market value of spectrum can be determined both directly, through sales of spectrum licenses by the FCC, and indirectly, through the market capitalization of companies whose businesses depend on such licenses. And if one tracks the market value of the broadband PCS spectrum against the FCC's conduct with respect to the C block licenses, one finds that the FCC – from its design of the auction itself to its position before this Court – has pursued a singular interest: to maximize its revenue from the sale, and resale, of spectrum.

Throughout the tortuous history of this case, the FCC's positions have been governed by, and have therefore

[3] While *amici* endorse the legal arguments advanced by NextWave, *amici* note that, even if the Court were to conclude that the FCC could cancel NextWave's licenses, such a determination would not necessarily be binding on *amici*, considering their quite different factual circumstances.

fluctuated with, the market value of spectrum. For example, the FCC designed the C block auction to obtain the highest possible bid prices, and employed standard instruments (*e.g.*, promissory notes, UCC financing statements) to protect its interests as a purchase-money creditor. And in the bankruptcy proceedings involving NextWave and other C block licensees, the FCC participated vigorously when it was undersecured (*i.e.*, the value of its claim exceeded the value of its collateral). It vigorously resisted any effort by bankrupt C block debtors to reduce the size of the FCC's claims and attempted to force favorable settlements, including one requiring transfer of the C block licenses reserved for small businesses to a major wireless carrier that had twice been barred from bidding on the C block licenses. But when the FCC became oversecured due to a sharp increase in the value of spectrum, it unilaterally exited the bankruptcy proceedings. It declared that the licenses had cancelled automatically as of October 1998, thereby mooting, on the eve of their confirmation, reorganization plans that provided for full, lump-sum payment of the debts, and rushed the licenses back to auction, all to realize for itself the three-fold increase in the value of spectrum over the prices obtained in the original C block auction.

We hasten to make clear that there is nothing wrong with the FCC becoming a creditor to winning C block bidders, nor in the FCC pursuing its financial interests as creditor in litigation with C block licensees. Indeed, licensees' positions in this case have also fluctuated with the value of spectrum, as dramatically illustrated by Verizon's recent voluntary dismissal of its *certiorari* petition in response to the significant decline in the value of spectrum since the FCC's reauction of NextWave's and Urban Comm's licenses. *See* FCC Br. 12 n.6.

What is wrong, however, is the FCC's disingenuous claim that its actions in this matter, particularly its cancellation of C block licenses for failure to make full and timely payment, were not "motivated solely or even primarily by fiscal concern." FCC Br. 37. According to the FCC, its purpose in conditioning C block licenses on full and timely payment of the licensees' installment obligations was not simply to secure the debt, in the manner of a typical, financially motivated commercial creditor. Rather, the FCC says that it sought primarily to protect its "regulatory interest" in ensuring that spectrum licenses are held by "the applicant[s] most likely to advance the public interest through efficient use of the spectrum." FCC Br. 17. "Failure to make timely payments," argues the FCC, "belies the regulatory implication of the [licensee's] original high bid, namely that the applicant will make the most efficient use of the spectrum." *Id.* at 24; *see also id.* at 15, 17-19, 36-40. Such a failure to pay thus "indicates that the spectrum was not optimally licensed and therefore triggers cancellation and prompt reallocation." *Id.* at 15.

The FCC's alleged regulatory justification for canceling NextWave's licenses is a transparent pretext, born of the agency's desire to stand apart from, and above, the other commercial creditors in NextWave's bankruptcy proceeding. Specifically, the FCC seeks to escape the grasp of 11 U.S.C. § 525, which flatly prohibits a government agency from revoking a license "solely because" the licensee is a debtor in bankruptcy and "has not paid a debt that is dischargeable" under the Bankruptcy Code. Although the FCC's cancellation of NextWave's licenses was admittedly triggered solely by NextWave's failure to make payments on its installment debt, the FCC argues that its alleged regulatory justification for the cancellation

precludes application of section 525, which it says reaches only license cancellations for strictly financial reasons.

As the D.C. Circuit held below, "section 525 prevents the Commission, *whatever its motive*, from canceling the licenses of winning bidders who fail to make timely installment payments while in Chapter 11." Pet. App. 49a (emphasis added). But even if the FCC's motive for canceling a license is determinative, the agency still loses this case, for its consistent, financially motivated *actions* as a commercial creditor speak louder than, and belie, its *words* claiming to be a public-spirited, neutral regulator.

Nor can the FCC's alleged "regulatory purpose" for canceling C block licenses be squared with the defining regulatory feature of the C block auction. In keeping with Congress's mandate to open the highly concentrated wireless industry to competition from start-up companies and small businesses, eligibility to participate in the C block auction was restricted to applicants with assets and revenues below prescribed limits. To enable such small businesses to participate in the auction, the FCC agreed to finance up to 90 percent of the purchase price through installment payments. The governing premise of the C block auctions was that *all* 92 winning bidders would have to fulfill their installment payment obligations by leveraging their licenses in the capital markets. Accordingly, it was equally obvious that *all* winning C block bidders were uniquely vulnerable to a decline in the value of spectrum. And when the value of spectrum declined dramatically in the months following the C block auction, *all* of the C block licensees were denied further access to the capital markets, and virtually *none* of them were able to make their installment payments to the FCC on a timely basis.

When the C block licensees approached the FCC *en masse* for relief from their installment payment obligations, the FCC recognized the generic, across-the-board nature of the problem by initially suspending all C block installment payments and then proposing four "restructuring" options, none of which offered relief from full and timely payment of the installment obligations. Confronted with an inability to raise capital to meet their license payment obligations, most of the C block licensees simply forfeited their down payments and folded their tents, while a few of these small businesses, including *amici* and NextWave, continued with their efforts to raise financing, build out the network with available capital and then eventually sought the breathing room afforded by the bankruptcy laws to give them time to fulfill their business plans.

Against this background, the FCC justifies its insistence on full and timely payment of C block installment obligations on the "regulatory" rationale that a winning "bidder's failure to make payment in a timely fashion is fatal to its implicit representation that it is the 'best' of the potential licensees" that competed in the auction. FCC Br. 37. But here virtually *none* of the C block licensees were able to make full and timely installment payments, due to economic reasons that were endemic to them as a class.[4]

[4] When the FCC resumed installment payments, only a handful of the 90 licensees elected to resume installment payments on all of their licenses. *See* FCC Public Notice (DA 98-1168), *Wireless Telecommunications Bureau Announces Broadband Personal Communications Services C Block Elections*, 13 F.C.C.R. 16,705 (June 16, 1998). Eventually, all of them either (1) transferred their licenses to another (frequently larger and better capitalized) entity; (2) ceased operations and surrendered their licenses; or (3) sought bankruptcy protection.

The very financial restrictions that qualified them to participate in the C block auction in the first place effectively guaranteed their inability to fulfill their license payment obligations in the face of a precipitous decline in spectrum value. And it is patently absurd for the FCC to suggest that other "potential licensees" among the qualified small business bidders would have been better able under the circumstances to fulfill the terms of their bids and to make prompt and efficient use of the spectrum. The only entities that plausibly might have done so were the very telecommunications giants that were explicitly barred from participation in the C block auction.

Indeed, the FCC's reauction of the C block spectrum resulted, ironically, in the redistribution of the licenses largely to those same telecommunications giants and to companies controlled by them. Thus, the FCC's actions at issue here, if upheld, will bring about the perverse result that a genuine "regulatory" interest mandated by Congress – entry of small businesses into the industry – will be sacrificed in favor of a bogus "regulatory" interest asserted by the FCC to escape its status as a creditor under the Bankruptcy Code.

ARGUMENT

I. The FCC Has Failed To Fulfill Its Mandate To Ensure That Small Businesses Receive PCS Licenses.

In 1993, Congress decided to chart a new course for the allocation of the nation's electromagnetic spectrum. Previously, the FCC had allocated spectrum first through a completely subjective application process and later through lotteries. In 47 U.S.C. § 309(j)(1), Congress directed the FCC to allocate spectrum "through a system

of competitive bidding." While auctioning spectrum to the highest bidder promised to generate significant revenue for the public fisc, Congress clearly harbored concerns that such a regime would pose insuperable barriers to start-ups and other small businesses. The new auction process thus threatened to further entrench established telecommunications conglomerates at the expense of the competition and innovation that entrepreneurial small businesses could bring to the wireless industry.

To stave off this eventuality, Congress directed the FCC to "promot[e] economic opportunity and competition and [to] ensur[e] that new and innovative technologies are readily accessible to the American people by . . . disseminating licenses among a wide variety of applicants, including small businesses [and] rural telephone companies." 47 U.S.C. § 309(j)(3)(B). In furtherance of this end, Congress mandated that the FCC consider "alternative payment schedules and methods of calculation, including lump sums or guaranteed installment payments." *Id.* § 309(j)(4)(A). After months of hearings and public comment the FCC issued its procedures for the auction of spectrum for wireless broadband personal communications services, commonly referred to as the broadband PCS spectrum. *In re Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 10 F.C.C.R. 403, ¶ 1 (Nov. 23, 1994) ("*Implementation of Section 309(j)*").

The broadband PCS spectrum consists of 120 MHz of electromagnetic spectrum. The FCC divided this 120 MHz of spectrum into six blocks: three blocks of 30 MHz (A, B, and C) and three blocks of 10 MHz (D, E and F). Following Congress's mandate, the FCC set aside the 30 MHz "C block" and the 10 MHz "F block" for auction to small

businesses, so-called "designated entities." 47 C.F.R. §§ 1.2110 & 24.709(a)(1) (1995). To qualify as a designated entity, an auction participant had to come within certain asset and revenue limits and ownership restrictions. *See Implementation of Section 309(j)* ¶ 12; 47 C.F.R. § 24.709 (1995). The FCC allowed successful C block bidders to pay their bid price in installment payments spread over ten years with interest-only payments for the first six years. *Implementation of Section 309(j)* ¶ 16.

Although the FCC had set aside spectrum for auction to small businesses, the design of its auction process actually operated against Congress's intentions to increase competition and provide economic opportunity for these small businesses. The FCC's first major misstep was its decision to auction the unrestricted A and B blocks before the C block. As the A and B blocks were each 30 MHz, this first auction distributed fully one half of the available broadband PCS spectrum. Although there were few restrictions on the qualifications of bidders, as a practical matter, this auction was open only to telecommunications giants with ready access to the public debt and equity markets. There are two main reasons for this: First, the licenses in the A and B blocks covered regional "major trading areas" ("MTAs"), as opposed to the licenses for smaller "basic trading areas" ("BTAs") (several of which might be contained in a single MTA). Few small businesses were prepared to bid on licenses for such large swaths of territory. Second, and more importantly, winning bids (for these enormous MTAs) had to be paid in full at the conclusion of the auction, which effectively precluded participation by small businesses.

The A and B block auction drew only 30 bidders, 18 of which walked away with licenses.[5] FCC Public Notice (PNWL 95-28), *Commercial Mobile Radio Service Information: Announcing The Winning Bidders In The FCC's Auction of 99 Licenses To Provide Broadband PCS In Major Trading Areas: Down Payments Due March 20, 1995*, Attachment A (Mar. 13, 1995) ("A and B Block Auction Results"). Because the A and B blocks had been auctioned first, C block bidders (or at least those that hoped to compete with the entrenched telecommunications powers) faced two serious challenges.

First, the established wireless communications players now enjoyed an enormous head start in building out networks and rolling out broadband PCS service. This "first mover" advantage added to the already enormous advantages established wireless companies enjoyed from their access to capital markets, their name recognition, and their pre-existing customer base. These significant market advantages were compounded when the FCC further delayed the C block auction in order to rewrite its "designated entity" regulations to comply with this Court's ruling in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). FCC Public Notice (PNWL 95-88), *FCC Postpones Short-Form Filing Date for 493 BTA Licenses Located in the C Block for Personal Communications Services in the 2 GHz Band* (July 27, 1995). Second, after the A and B block auction allocated one half of all the broadband PCS spectrum, only one block of 30 MHz licenses remained. A fledgling carrier with only a 10 MHz license could never hope to compete effectively with the established wireless

[5] If one excludes the three MTAs for which there was the least demand, Alaska, Guam and the Northern Marinara Islands, and American Samoa, the number of winning bidders shrinks to 13.

powers in a major metropolitan area, for that amount of spectrum would be inadequate to support the customer traffic. Both of these challenges counseled that if new entrants entertained any hope of competing with the established wireless companies, it was critical that they obtain 30 MHz C block licenses. And, in any event, a new entrant dared not wait for the FCC to bring the F block licenses to market while the A and B block licensees grabbed even more market share.

Predictably, as a result of these competitive forces and the limited supply of 30 MHz PCS spectrum in the C block auction, the price increased. The C block auction finally began in December 1995, more than nine months after the close of the auction of the A and B blocks. Two hundred fifty-five small businesses qualified as "designated entities" and entered the auction, competing for 493 licenses, one for each BTA in America. When the bidding stopped in May 1996, 89 designated entities had submitted winning bids totaling $10.1 billion with an average spectrum price of $1.33/MHz/POP.[6] *See* C Block Auction Results. These bids reflected a steep increase in price (161%) over the amounts paid for equivalent licenses in the A and B blocks. A and B Block Auction Results (average price of $0.51/MHz/POP). *See* The increased price reflected both

[6] Price per megahertz per population is the standard measuring unit for the value of electromagnetic spectrum licenses. By controlling for licenses' differing breadth of spectrum and size of population served, $/MHz/POP unit allows one to compare different electromagnetic spectrum license transactions. The unit is equal to the price of the license (or licenses) divided by the breadth of the license in number of megahertz, divided by the population served by the license. By way of comparison to the C block auction, the auction of the A and B block licenses yielded only $0.52/MHz/POP. *See* A and B Block Auction Results, Attachment A.

the competitive forces identified above but also an overall upswing in the market's valuation of spectrum during the fourteen-month gap between the close of the first auctions and the end of the C block auction.[7] Thus, the FCC's delay in bringing the C block spectrum to market contributed to the increased prices.

Each successful bidder in the C block was required to submit down payments totaling 10 percent of the net bid (the bid minus any applicable bidding credit) in order to obtain its license. The FCC financed the remaining 90 percent of the bid price with a ten-year loan (with interest-only payments for the first six years) secured by a first lien on the PCS license. 47 C.F.R. § 24.711(b) (1995). In order to obtain its PCS license, each successful C block bidder had to execute a promissory note for the amount of the loan, Pet. App. 389, and the FCC filed UCC financing statements recording its lien on the PCS license.

As referenced above, only "designated entities" were eligible to participate in the C block auction. 47 C.F.R. §§ 1.2110 & 24.709(a)(1) (1995). To qualify as a "designated entity," the bidder (together with any affiliates) could not exceed $500 million in total assets or $125 million in gross revenues in each of the last two years. *Id.* However, the FCC's most generous 25 percent bidding credits were available only to a designated entity that also qualified as

[7] From the close of the auction of the A and B blocks in March 1995 to the close of the C block auction in May 1996, the price of PCS stocks rose an average of 18.8%. *See* PCS Index, *infra* at App. 1a. The PCS Index is a market capitalization-weighted index of publicly traded stocks in the PCS industry. More information concerning the methodology of the PCS Index is included *infra* at App. 2a-6a.

a "small business," meaning it has less than $40 million in gross revenues. 47 C.F.R. § 24.720(b)(1) (1995); *id.* § 24.712(a) (creates bidding credit of 25 percent). Of the 255 designated entities that participated in the C block auction, 253 qualified for the bidding credit available to small businesses.[8]

Amici Urban Comm and KPCS are paradigm illustrations of the C block licensees. Urban Comm was formed by a group of minority businessmen who sought to bring PCS service to traditionally underserved areas of the South. Urban Comm submitted winning bids on 23 C and F block licenses in Virginia, North Carolina, and South Carolina for a total bid price of $86.3 million. Kansan Bertha Coffin saw the C block auction as an opportunity to leverage her experience in operating the Council Grove Telephone Co. (left to her by her husband upon his death in 1978). She formed KPCS to bid on licenses in the C block auction, eventually winning three licenses in Kansas for $9.7 million. Both Urban Comm and KPCS quickly obtained financing to make their 10 percent down payments, but after the collapse of the spectrum market in 1997, the capital markets closed to C block licensees and they, like NextWave, were soon forced into bankruptcy.

Wireless communications is a capital-intensive industry. Once a carrier acquires licenses, it must spend hundreds of millions, if not billions, of dollars to build out its network before it ever sees revenue from customers. By mandating that C block bidders have assets of less than

[8] *FCC Auction 5: Broadband PCS, Fact Sheet*, available at http://wireless.fcc.gov/auctions/05/factsheet.html (last updated May 28, 2002).

$500 million and annual revenues of less than $40 million, the FCC ensured that each C block licensee would be required to access the capital markets in order make its installment payments on its licenses and to build out its network. Given the length of time it takes to build out a PCS network and the asset and revenue limitations on eligible C block licensees, the ability to raise funds in the capital markets was essential to the survival not only of C block licensees but also of the FCC installment payment regime.

The FCC's subsequent actions greatly contributed to the difficulties of the C block licensees in raising the capital necessary to make the looming installment payments. On April 5, 1996, as the C block auction was nearing its conclusion, the FCC announced its "plans to auction the spectrum for the [PCS] D, E and F blocks." FCC Press Release, *FCC Hits $20 Billion Mark in Total Auction Revenues*, 1996 WL 159208 (Apr. 15, 1996). The FCC subsequently opened the auction for the D, E and F blocks – *all* the remaining broadband PCS spectrum – in August 1996, less than four months after the C block auction closed and before many successful C block bidders, including NextWave and Urban Comm, had obtained their C block licenses which was a prerequisite to their business plans.

The spectrum market, which had already declined significantly since the C block auction,[9] reacted predictably to this sudden increase of PCS spectrum supply. The price of spectrum collapsed. In this auction of the D, E, and F blocks, the FCC could muster only $0.33/MHz/POP (as compared to $1.33 in the May 1996 C block auction). FCC

[9] From the close of the C block auction (May 6, 1996) to the start of the auction of the D, E, and F blocks, the price of PCS equities fell 8.3%. App. 1a.

Public Notice (DA 97-81), *D, E and F Block Auction Closes*, 1997 WL 20711 (Jan. 15, 1997) ("D, E, & F Block Auction Results"). The flood of supply overwhelmed demand even for major metropolitan markets. In New York City, the D, E, and F blocks sold at an average price of $0.34/MHz/POP, whereas the C block had sold for $1.84/MHz/POP just four months earlier. In Los Angeles, what had sold for $1.52/MHz/POP in May was, suddenly, worth no more than $0.17/MHz/POP four months later. *Compare* C Block Auction Results *with* D, E, and F Block Auction Results.

This precipitous drop in the value of spectrum immediately cooled the interest of the capital markets in PCS license holders.[10] The start of the D, E, and F block auction signaled a precipitous decline in the equity values of publicly traded PCS stocks, shedding 32 percent of their value over the next seven months. App. 1a. Of course the publicly traded PCS stocks were largely A and B block

[10] In a recent hearing of the House Subcommittee on Telecommunications and the Internet, Rep. Billy Tauzin made the point succinctly:

> [T]he speed with which Congress and the FCC went out and auctioned additional spectrum had several deleterious effects upon the C-Block auctions. First of all, it diminished the value of those licenses as we put more spectrum out into the public domain, and therefore made each bid on spectrum less valuable. Second, it may have severely undercut the capacity of groups like NextWave to go out and do their financing as the value of their asset, the spectrum they had bid in, [may] have been diminished by the government action.

The Settlement Between the U.S. Government and NextWave Telecom Inc. to Resolve Disputed Spectrum Licenses: Hearing Before the Subcomm. on Telecommunications and the Internet of the House Comm. on Energy and Commerce, 107th Cong. 24 (2001) (statement of Rep. Billy Tauzin).

licensees, who on average paid only a multiple of 1.54 times over D, E, and F block values. C block bidders, on average, paid a multiple of 4.03 times D, E, and F block values. *Compare* A and B Block Auction Results *with* C Block Auction Results *with* D, E, and F Block Auction Results. The survival of the winning C block bidders had always, by the FCC's design, depended upon their ability to leverage their licenses in the capital markets. The C block licensees now found the capital markets closed to them, spooked by the glut of PCS spectrum and the resulting apparent overvaluation of the same by C block bidders. *See* JA 315.

After the D, E, and F block auction, C block licensees found themselves in a bind. The capital markets were closed, available cash had largely been spent to meet the FCC's aggressive network build-out requirements, and, as designated entities, they had no significant sources of revenue that could generate sufficient cash to weather the spectrum valuation storm. It did not take long for C block licensees to become insolvent. Pocket Communications, the second largest C block licensee, fell first, on March 31, 1997.

In the face of these market realities, the FCC blithely acknowledged that C block licensees were experiencing "a range of apparent difficulties in accessing the capital markets." *In the Matter of the Commissions Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licenses, Second Report and Order and Notice of Further Rulemaking*, 12 F.C.C.R. 16,436, ¶ 11 (Oct. 16, 1997). As a solution, the FCC offered licensees a menu of four "restructuring" options, none of which offered relief from full payment of the underlying debt obligations. If the licensees did not resume full

payments, they would be forced to forfeit at least 30 percent of their down payments on surrendered licenses. *See In re the Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees: On Reconsideration of the Second Report and Order*, 13 F.C.C.R. 8345, ¶¶ 21-60 (Mar. 24, 1998) (*"Reconsideration of the Second Report and Order"*).

Even as C block licensees, including NextWave and *amici* Urban Comm and KPCS, were scouring the capital markets for funding in order to stave off bankruptcy, the FCC's regulatory positions concerning C block installment payments exacerbated the already difficult situation. For example in March 1998, as C block licensees were seeking to finance one of the restructuring options, the FCC proposed a settlement in the Pocket Communications bankruptcy, whereby the creditors would take Pocket's licenses in the valuable Chicago and Dallas MTAs at forty cents on the dollar. This deal imputed a value of $0.72/MHz/POP in these major urban centers – far less than most C block licensees were going to pay under the FCC restructuring. FCC Public Notice (DA 98-547), *Commission Staff Requests Submission of Superior Alternatives to Proposed Agreement to Resolve Pocket Communications Bankruptcy*, 13 F.C.C.R. 6754 (Mar. 23, 1998). Not surprisingly, C block financing sources backed out of many pending deals.

After NextWave's public and private financing efforts did not materialize, and with a large number of creditors filing for attachment of NextWave's assets, NextWave filed a Chapter 11 bankruptcy petition in June of 1998, setting the stage for this case. *Amicus* Urban Comm followed NextWave into bankruptcy in October 1998; KPCS was

involuntarily forced into bankruptcy by its creditors in July 1999. Eventually, virtually every other C block licensee simply walked away or sold out to better-capitalized players, forced to abandon their efforts to make use of the licenses that they had bid on successfully. *See supra* at 6 & n.4.

In the aftermath of the C block debacle, the FCC now seeks to wrest control of the few licenses that remain in the hands of small businesses. Specifically, in direct contravention with its congressional mandate, the FCC relaxed its eligibility rules and permitted companies controlled by the largest wireless carriers, including Verizon, Cingular and AT&T Wireless, to purchase licenses once reserved for entrepreneurs in a reauction of the spectrum. *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses: Sixth Report and Order on Reconsideration*, 15 F.C.C.R. 16,266, ¶¶ 17-19 (Aug. 29, 2000) ("*Sixth Report and Order on Reconsideration*").

II. The FCC's Proffered "Regulatory" Justification For Canceling NextWave's Licenses Is Belied Both By Its Own Regulations And By Its Actions Throughout The NextWave Litigation.

Under the straightforward dictates of section 525 of the Bankruptcy Code, the FCC is barred from canceling NextWave's licenses "solely because" of nonpayment of NextWave's debt obligations under the license. Thus, as discussed *supra* at 4, the FCC claims that it was not "motivated solely or even primarily by fiscal concerns." FCC Br. 37. According to the FCC, even though nonpayment of the debt obligations was the direct, proximate, and

exclusive cause of the cancellation of the licenses, section 525 does not stand as a barrier to this action because the act of nonpayment itself has "regulatory" implications.

The FCC maintains that the C block licenses were awarded to the highest bidder on the assumption that the willingness to pay the most for the license demonstrated that such bidders were in the best position to utilize the spectrum promptly and efficiently. Failure to make full and timely payment "indicates that the applicant, despite its bid, is 'not the applicant most likely to use the [l]icenses efficiently' in the public interest." FCC Br. 19 (quoting Pet. App. 109a, 234a); *see also* FCC Br. 37 ("Because the bid is the central regulatory mechanism used to identify the 'best' licensee from among competing applicants, the bidder's failure to make payment in a timely fashion is fatal to its implicit representation that it is the 'best' of the potential licensees."). Thus, "cancellation occurs primarily because of the licensee's noncompliance with license conditions, which demonstrates that it is *not* the applicant that will best use the license in the public interest." FCC Br. 21-22 (emphasis in original).

The FCC's course of conduct throughout the history of the C block licenses, however, thoroughly belies its claimed "regulatory" justification. From the inception of the auction process through the most recent reauctioning of the C block licenses, the FCC's actions have been driven by its desire to maximize its revenue from the sale, and resale, of the C block spectrum. The FCC's positions correlate precisely to the value of spectrum at any given time. And just as these values have fluctuated sharply over the last several years, so too has the FCC's position on the appropriate fate of the licenses in question. As the discussion below demonstrates, the FCC's positions make

sense only as a function of its single-minded pursuit of its financial interests, to the exclusion of its genuine regulatory interest in fostering competition in the wireless industry by new entrants and small businesses. And this record leaves no doubt that the licenses were cancelled and reauctioned for one, and only one, reason: the FCC's desire to realize for itself a sharp increase in the value of spectrum over the amount fetched in the original auction.

A. The FCC Has Pursued Only Its Financial Interests Throughout Its Dealings With The C Block Licensees.

Throughout its dealings with the C block licensees, the FCC has pursued its financial interests in generating revenue from the auction process. The very rules governing the awarding of licenses made clear that maximization of revenue was the top priority: the FCC promulgated regulations mandating that the C block licenses be distributed to the highest eligible bidder, 47 C.F.R. § 1.2109(e) (2000) ("Licenses *will be* awarded upon the full and timely payment of winning bids") (emphasis added), and allowed licensees 10 years to pay for their licenses. The FCC's rules thus deprived the FCC of the ability to judge the prospective licensees on any criterion other than the ability to generate the most revenue for the Treasury. It did *not* condition license grants on specified build-out targets, periodic checks of financial health, or other evidence that winning bidders fulfill the regulatory interest in efficient use of the spectrum. Rather, the FCC trumpets the fact that it uses a bidder's willingness to pay more as a proxy for this sort of basic due diligence. FCC Br. 49 (labeling such criteria "marginal qualifications" as compared to its own). Thus, the payment of the installment

debts incurred by licensees, and nothing more, was the touchstone of the FCC's policy.

With this financial motivation firmly established, the FCC employed standard credit instruments to protect the agency's interests. Specifically, the FCC required C block licensees to sign promissory notes with mandatory payment schedules, and conditioned the licenses on full and timely payments. The terms of the note made clear that the C block licensees would be liable for the full amount of the outstanding debt obligations: "Upon a default under this Note, the unpaid Principal Amount, plus all unpaid interest accrued thereon, together with any late fee and/or administrative charge . . . shall become immediately due and payable." Pet. App. 392. The pertinent regulations also reflected the fact that the FCC would hold a defaulting licensee responsible for the full amount of any losses attributable to a breach, as well as a "penalty" of liquidated damages. 47 C.F.R. § 24.704(a)(1)-(2) (1995) (defaulting bidder is "subject to a penalty equal to the difference between the amount bid and the amount of the winning bid the next time the license is offered by the Commission" . . . "plus an additional penalty equal to three (3) percent of the winning bid."). Additionally, the FCC required security agreements to be executed, and filed UCC financing statements to secure a first lien on the licenses.[11]

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[11] In fact, when the C block licensees, desperate for financing, implored the FCC to give up its first lien on the licenses, the FCC refused. The FCC thus deprived the C block licensees of their ability to leverage their only significant asset.

B. The FCC's Actions Correlate To The Value Of Spectrum And Belie Its Proffered "Regulatory" Objectives.

When it became clear that the C block licensees would not be able to make their debt payments and that some would seek bankruptcy protection, the FCC sought to further its pecuniary interests by calibrating its conduct with the market value of spectrum. And contrary to the FCC's arguments, this course of conduct did not advance its regulatory objectives, but rather, it was frequently at war with the FCC's congressional mandate to distribute licenses to new entrants in the industry.

When NextWave filed for bankruptcy protection in June 1998, there had not been a PCS spectrum auction since the disastrous D, E, and F block auction in January 1997 that netted only $0.33/MHz/POP. In March of 1998, in its proposed settlement in the Pocket Communications bankruptcy, the FCC was willing to accept $0.72/MHz/POP, 40 cents on the dollar, for licenses in the Chicago and Dallas MTAs. Even $0.72/MHz/POP, however, was a great deal less than the $1.53/MHz/POP NextWave had bid for its C block licenses. So it is not surprising that rather than immediately seek a settlement, the FCC filed its claim in bankruptcy for $4.77 billion (plus attorneys' fees), JA 34, vigorously opposed NextWave's adversary fraudulent transfer proceeding, and hoped for a better offer.

That all changed in May of 1999 when the bankruptcy court ruled that NextWave's purchase of C block licenses was a fraudulent transfer. Pet. App. 357a-358a. The next month, the bankruptcy court confirmed its remedy, setting aside $3.7 billion of NextWave's bid price of $4.7 billion. *Id.* at 273a-274a. That decision reduced the price basis of

NextWave's C block licenses by 78 percent – from $1.53/MHz/POP to $0.33/MHz/POP.

Leveraging its status as the largest creditor in the bankruptcy case, the FCC promptly attempted to force the sale of all of NextWave's licenses to a major carrier, Nextel, for approximately $2.1 billion. Under the settlement, Nextel would pay $1.6 billion in cash to the FCC, and the FCC would retain the nearly $500 million that NextWave had paid to the FCC as down payments required to obtain the licenses. D.C. Cir. JA 904. Under this deal, the FCC would have recovered $0.59/MHz/POP. While this reorganization plan certainly looked out for the government's financial interest, it was at war with FCC's regulatory interest in promoting competition and assisting the entry of small businesses into the marketplace. Ironically, the FCC had twice rejected applications by Nextel to participate in PCS auctions as a "designated entity." *Reconsideration of the Second Report and Order* ¶ 69. Nevertheless, the term sheet between Nextel and the FCC contemplated the waiver of regulations that prohibit a "designated entity" from transferring the license to an entity not meeting those asset and revenue restrictions. D.C. Cir. JA 905. The Congressional mandate to avoid "excessive concentration . . . by disseminating licenses among a wide variety of applicants," 47 U.S.C. § 309(j)(3)(B), was thus subordinated to the FCC's pecuniary interest.

After the FCC's attempted sale of NextWave to Nextel was scrapped, the FCC rebuffed several settlement overtures by NextWave and pinned its hopes on the Court of Appeals for the Second Circuit reversing the order of the bankruptcy court. Meanwhile, however, the publicly traded PCS stocks were experiencing a sharp rise in market valuations. In the three months from the bankruptcy court's

fraudulent transfer ruling (May 12, 1999) to issuance of the FCC-Nextel term sheet (August 10, 1999), PCS stock prices rose 19 percent. App. 1a. By the time the FCC submitted its brief to the Second Circuit (September 14, 1999), PCS stocks had risen another 34 percent. *Id.* On the date of oral argument (November 1, 1999), PCS stocks had risen another 33 percent, a 349 percent increase since NextWave's bankruptcy filing just 16 months earlier. *Id.*

By the time the Second Circuit rendered its opinion reversing the bankruptcy court, Pet. App. 213a., PCS stocks had risen still further. At then-current valuations, fully 500 percent higher than when the first C block auctioned, App. 1a, the FCC could expect to generate substantially increased revenues from the sale of the licenses. So, notwithstanding NextWave's January 10, 2000, offer to pay its entire license debt in a single lump sum payment, and notwithstanding 47 U.S.C. § 309(j)(7)(A) ("The Commission may not base a finding of public interest, convenience, and necessity on the expectation of federal revenues."), on January 12 the FCC abandoned numerous positions held throughout the 18-month bankruptcy proceeding and announced that NextWave's and other C Block licensees' licenses had automatically cancelled as of October 1998.[12] Rushing to bring its repossessed

[12] If, as the FCC now maintains, NextWave's licenses truly had automatically cancelled as of October 1998, one cannot help but wonder why the FCC did not reauction NextWave's licenses along with those that were forfeited as part of the FCC restructuring options in the spring of 1999. One reason may have been that the demand for spectrum at that time was so diminished by the FCC's flooding the market that the 1999 auction yielded merely $0.16/MHz/POP. FCC Public Notice, *C, D, E and F Block Broadband PCS License Auction Closes* (DA 99-757), 14 F.C.C.R. 6688, Attachment A (Apr. 20, 1999).

spectrum to market, the FCC announced the reauction of NextWave's that same day.[13]

To further ensure the maximization of revenue, the FCC took the additional step of opening the reauction of NextWave's and Urban Comm's licenses to the previously barred telecommunications giants. *Sixth Report and Order on Reconsideration* ¶¶ 17-19. While installment payments had been scrapped some time earlier, *In re Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licenses*, 13 F.C.C.R. 15,743, ¶ 50 (Aug. 19, 1998) ("*Amendment Regarding Installment Payment Financing*"), the FCC had not yet reduced the sliver of spectrum occupied exclusively by "designated entities." Prior to the reauction of NextWave's and Urban Comm's licenses, however, the FCC capitulated to the demands of incumbent carriers for the opportunity to acquire more spectrum, especially in lucrative, densely populated urban areas. In a complicated restructuring of the C and F blocks, the FCC removed all "designated entity" restrictions on approximately half the licenses. *Sixth Report and Order on Reconsideration* ¶¶ 16-29. Furthermore, as to the few licenses still restricted to designated entities, the FCC relaxed ownership restrictions such that established telecommunications giants could hold substantial positions in (if not directly control) designated entities. 47 C.F.R. § 24.709(b) (2000).

[13] On September 6, 2000, the FCC announced that Urban Comm's licenses had also automatically cancelled and would be reauctioned along with NextWave's. FCC Public Notice (DA 00-2038), *C and F Block Broadband PCS Spectrum Auction Scheduled for November 29, 2000 Rescheduled for December 12, 2000,* 15 F.C.C.R. 17,251 (Sept. 6, 2000).

Despite the pendency of NextWave's appeal to the D.C. Circuit, the FCC pushed ahead with the reauction, ignoring concerns raised by NextWave and others that reauctioning the licenses prior to the completion of appellate review risked causing more litigation and more delays in bringing the spectrum to market. *In re Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses NextWave Personal Communications Inc. and NextWave Power Partners Inc. Petition for Reconsideration*, 15 F.C.C.R. 17,500, ¶ 11 (Sept. 6, 2000) ("*In re Public Notice DA 00-49*"). The FCC's haste is not surprising, given that PCS stock prices, after their meteoric rise, were beginning to descend to a more earthly realm. When the reauction commenced on December 12, PCS stock values had declined 39 percent from the January 12 announcement that NextWave's licenses had cancelled and were being reauctioned. App. 1a.

Nevertheless, PCS equity values were still 261 percent greater than they were when the first C block auction ended. *Id.* Demand was high, and the supply of PCS spectrum was limited. Led by Verizon, 35 bidders submitted high bids for NextWave's and Urban Comm's licenses that totaled $16.3 billion – $4.03/MHz/POP. FCC Public Notice (DA 01-211), *C and F Broadband PCS Auction Closes* (Jan. 24, 2001) ("C and F Block Reauction Results"). By moving quickly to reauction the spectrum, the FCC had fulfilled its purpose of locking in resale of the spectrum at a greatly increased value and realizing that increase in value for itself.

This course of conduct speaks volumes about the true nature of the FCC's interests. The precise correlation between the value of spectrum and the FCC's actions is no accident, but rather demonstrates that the FCC has

pursued its commercial and financial interests, to the exclusion of its genuine regulatory interests, at every stage of the bankruptcy proceedings.

III. The FCC's Alleged "Regulatory" Justification For Canceling C Block Licenses Is At War With The Defining Regulatory Feature Of The C Block Auction.

Whatever validity the FCC's avowed "regulatory" purpose may have as a general matter, it simply has no application with respect to the decision to cancel the licenses of the C block bidders. As noted previously, the C block licenses were intended to fulfill Congress's mandate that the wireless industry be opened to competition from new entrants and small businesses, and the defining regulatory feature of the C block auction was its restriction to bidders having assets and revenues below prescribed limits. The auction participants, including the FCC, fully understood that winning bidders would have to leverage their licenses in the capital markets in order to pay for and exploit the licensed spectrum. It was equally predictable that a sharp decline in the value of spectrum would close the capital markets to these licensees, imperiling all or virtually all of them. And when the value of spectrum did in fact plummet, the capital markets did in fact close to C block licensees. As the Bankruptcy Court noted: "Approximately $1.6 billion of public financing was sought by the C block licensees after the award of their licenses. Not one dollar of this $1.6 billion was raised in the public markets." Pet. App. 315. Consequently, virtually none of the 90 small businesses holding such licenses were able to make full and timely payment on their debt obligations.

Thus, the FCC's avowed "regulatory" justification for canceling the C block licenses – namely, that nonpayment demonstrates that another applicant (*i.e.*, a losing bidder) would have in fact been better able to put the spectrum into service – is plainly inapplicable in this case.[14] Given that virtually none of the winning C block bidders were able to make full and timely payment of their debt obligations, it is clear that such nonpayment is in no way inconsistent with their being "the 'best' of the potential licensees" that competed in the auction. FCC Br. 37. To the contrary, the very financial restrictions that qualified them to participate in the C block auction effectively guaranteed their inability to fulfill their license payment obligations in the face of a precipitous decline in spectrum value. And it is simply absurd to suggest that the next-highest bidders would have been able to withstand the market downturn to which the winning bidders uniformly succumbed.[15] A rising tide lifts all boats, and a falling tide begets the opposite phenomenon.

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[14] When a regulatory agency, such as the FCC, finds it expedient to enter into arms-length commercial transactions with business entities, it must be held to the rules of contract and other commercial laws, including the bankruptcy laws, that govern all other commercial transactions. *See generally United States v. Winstar Corp.*, 518 U.S. 839 (1996). It cannot be allowed to change the rules when it suits it or its "regulatory" purpose. In the instant case, that principle has been legislated for the very situation in which NextWave and the *amici* find themselves. Perceptive legislators foresaw the evil with which the C block licensees are now faced – the likelihood that regulatory agencies would, under claim of "regulatory" power, attempt to annul the benefit of the "fresh start" principle by revoking the license of a bankrupt licensee – and therefore prohibited cancellation of licenses for non-payment of a debt that under the bankruptcy law is not payable.

[15] Reviewing the bankruptcy court's fraudulent transfer order, the district court reached the same conclusion. "[T]he C Block auction was a disaster for every participant. Those who bid but did not win are likely

(Continued on following page)

In short, the FCC's alleged regulatory purpose is in truth a regulatory ruse, designed to shield the agency, NextWave's largest creditor, from the requirements of the bankruptcy law.

* * *

As the foregoing reflects, the FCC's implementation of Congress's straightforward mandate to confer licenses on small businesses through a competitive bidding process has been a disaster for the C block licensees. These small companies made significant down payments and embarked upon the build-out of their networks. As a result of adverse market forces that were exacerbated by governmental policies and actions, these companies suffered a temporary setback in the execution of their business plans. For several years now, those that sought the shelter of bankruptcy protection have attempted to make full and timely payment on their license obligations. But rather than accept these payments and allow these entrants to fulfill Congress's original intent, the FCC has sought to repossess the spectrum and to reauction it at higher prices to companies controlled by the very entrenched incumbents that were excluded from bidding in the first place. Millions of customers have been inconvenienced by the scarcity of spectrum occasioned by the FCC's policy. This Court should not bless this strategy and condemn the spectrum to nonusage for years to come as the other bankruptcy and constitutional issues raised by NextWave and *amici* are resolved in the lower courts. Rather, the few remaining C block licensees should be permitted to become active participants in the wireless industry.

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not hurt. . . . [I]f they had won the bid at the C block auction, they would likely be in bankruptcy right now." Pet. App. 270a.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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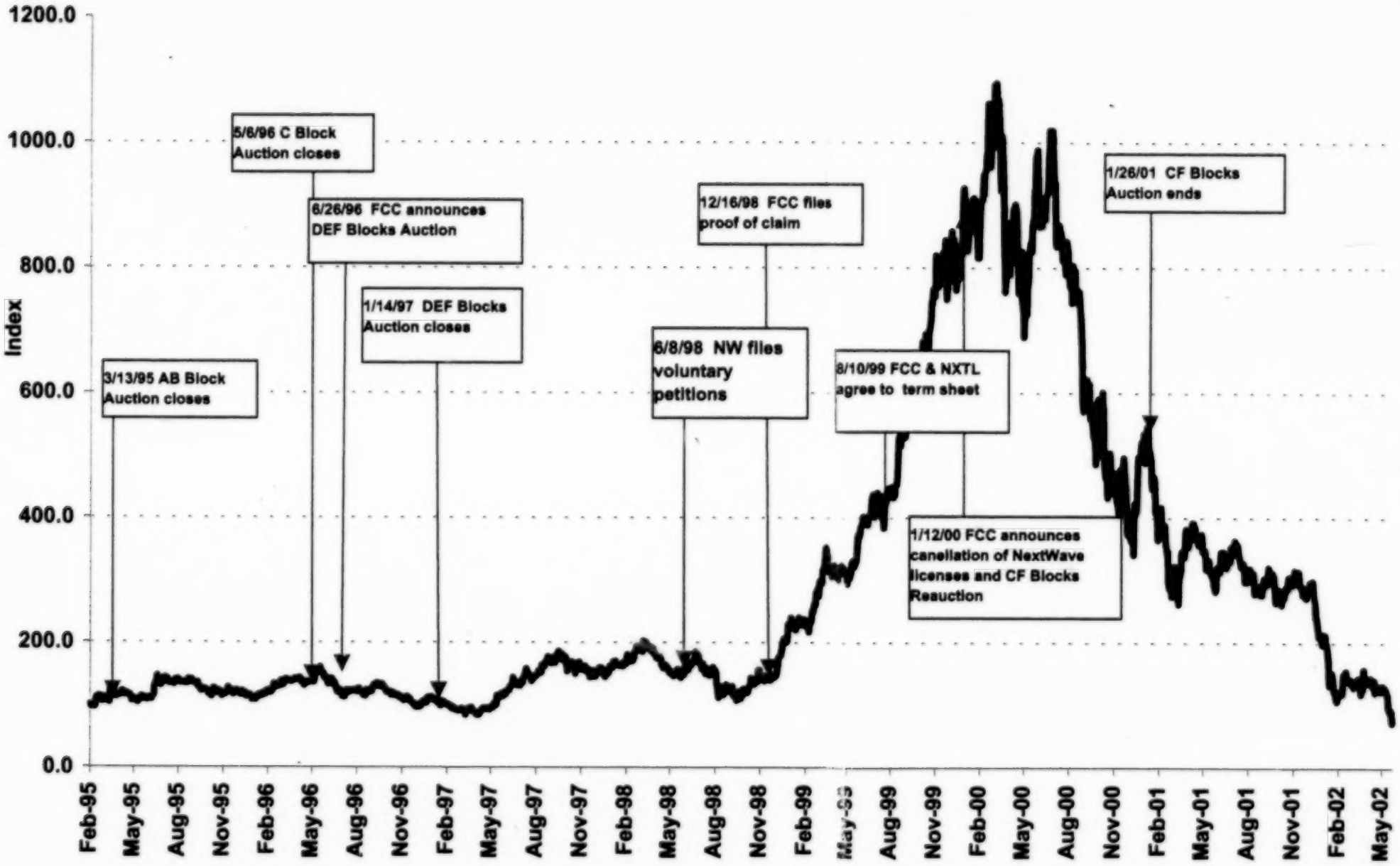
June 21, 2002

Wireless Stock Price Index

March 1995 thru December 2001



Explanation Of Methodology To Create Historical Stock Price Index Graphs For The Wireless Sector

Based upon standard valuation practices in the investment banking industry, UBS Warburg, investment banker for several PCS businesses, including NextWave, has created a PCS Index that reflects the value of spectrum. The index reflects the valuation of publicly traded stocks for companies primarily engaged in the wireless PCS industry. Conglomerates whose valuations depend upon unrelated lines of business have been excluded from the index. The valuation of the "pure-play" wireless companies in the index is highly correlated with the value of spectrum because the markets value the companies in the index based upon their ability to generate earnings from the utilization of spectrum. The markets apply this same valuation analysis to spectrum itself: the value of spectrum depends upon the expected earnings that the wireless companies can generate from its use. Thus, there is a high correlation between the value of spectrum and the value of wireless companies.

To assess the historical trading patterns of equity securities in the wireless industry, we have employed a methodology using a market capitalization weighted average index ("Index"). In this indexing method, companies with larger equity market values contribute more heavily to the overall average index value. This is the same method by which the Nasdaq Combined Composite index is calculated.

BASIC INDEX METHODOLOGY

The following details the manner in which the market capitalization weighted index was constructed:

1) Identify the appropriate publicly traded companies to include in the index universe. For our index we included the following companies: Sprint PCS, Airgate PCS, Nextel, Western Wireless, U.S. Cellular, Omnipoint, Powertel and Aerial

2) Calculate the market capitalization of each company in the index on a specified start date ("Start Date," which we have chosen to be February 24, 1995). The market capitalization for a company on a given date is calculated by multiplying a company's shares outstanding by the company's ending share price on that date.

3) Sum the individual market capitalizations to get an aggregate market capitalization ("Aggregate Market Capitalization" or on the first measurement date the "Base Market Capitalization"). The Base Market Capitalization acts as the denominator in calculating the index on a given day.

4) Calculate the Aggregate Market Capitalization for the company set on each subsequent trading day from the Start Date until the last date of the evaluation period.

5) For each trading day, divide that day's Aggregate Market Capitalization by the Base Market Capitalization and multiply the result by 100. The result is that trading day's indexed value. By definition, the index must equal 100 on the Start Date, as the numerator and denominator of the index calculation both are equal to the Base Market Capitalization.

The following offers an example of the market capitalization weighted methodology:

	Market Cap ($)				
	Start Date	**Day 2**	**Day 3**	**Day 4**	**Day 5**
Company A	100	103	105	105	108
Company B	50	52	56	60	53
Company C	200	190	194	198	192
Total	350	345	355	363	353
Base Mkt Cap	350	350	350	350	350
Index	**100.0**	**98.6**	**101.4**	**103.7**	**100.9**

ADJUSTMENTS TO INDEX

Changing Company Set

Over an evaluation period, it is possible that certain companies either exit or enter the index set (companies may exit because of acquisition, bankruptcy or change of business mix; companies are usually added after an initial public offering). The calculation of the index adjusts to take into account the changes to the index set.

If a company is removed from the index, the Base Market Capitalization is adjusted by reducing its value by the market capitalization of the removed company as of the Start Date. This adjusted Base Market Capitalization is then used to calculate the index going forward. For example, if the market capitalization of the company to be removed on the Start Date was 15, then the index on the first trading day without the removed company would be calculated as follows:

Original Base Market Capitalization	100
Less: Market Cap on Start Date of Removed Company	15
New Base Market Capitalization	85
Aggregate Market Capitalization (ex Removed Company)	145
Index	170.6

If a company is added to the index and it is not the initial public offering for the newly added company, then a similar adjustment is made to the Base Market Capitalization (adding the market capitalization of the new company as of the Start Date) and the index is then calculated off the new Base Market Capitalization until another adjustment is required.

Special Adjustments For Initial Public Offerings

Because at the time of its initial public offering, a newly added company does not have a historical market capitalization as of the Start Date, the index calculation must adjust the Base Market Capitalization at the time of the initial public offering. To allow for the new company to be added to the index without creating a misleading impact to the index, the index is adjusted to reflect the day over day change in the Aggregate Market Capitalization of the company set since the new company was added. This is accomplished by taking the Aggregate Market Value from the current trading day divided by the Aggregate Market Value from the previous day and multiplying this quotient by the previous day's index. This methodology allows the index immediately prior to the IPO to be adjusted going forward by the relative day-to-day change in the company set's market capitalization, but include the new company's

impact on this change. Since the first time that there are two consecutive trading days that include the new company is the second trading day after the initial public offering, the impact of the new company is first reflected in the index on its second trading day.

Wireless Index Data

DATE	*Index Value*	*Description*
24-Feb-95	***100.0***	***Index Start Date***
27-Feb-95	***96.5***	***1995 Index Low***
1-Mar-95	98.1	First Trading Day of the Month
13-Mar-95	***114.0***	***A & B Block Auction Ends***
3-Apr-95	105.0	First Trading Day of the Month
1-May-95	121.6	First Trading Day of the Month
1-Jun-95	103.7	First Trading Day of the Month
3-Jul-95	114.9	First Trading Day of the Month
11-Jul-95	***146.3***	***1995 Index High***
1-Aug-95	141.3	First Trading Day of the Month
1-Sep-95	136.0	First Trading Day of the Month
2-Oct-95	135.8	First Trading Day of the Month
1-Nov-95	116.3	First Trading Day of the Month
1-Dec-95	120.7	First Trading Day of the Month
18-Dec-95	***118.9***	***C Block Auction Begins***
1-Jan-96	116.7	First Trading Day of the Month
1-Feb-96	113.5	First Trading Day of the Month
1-Mar-96	119.9	First Trading Day of the Month
1-Apr-96	141.0	First Trading Day of the Month
1-May-96	140.4	First Trading Day of the Month
6-May-96	***135.4***	***C Block Auction Ends***
3-Jun-96	150.8	First Trading Day of the Month
10-Jun-96	***160.3***	***1996 Index High***
26-Jun-96	***132.8***	***FCC Announces D, E, & F Block Auctions***
1-Jul-96	142.4	First Trading Day of the Month
1-Aug-96	120.5	First Trading Day of the Month
26-Aug-96	***124.1***	***D, E, & F Block Auction Begins***
2-Sep-96	121.9	First Trading Day of the Month
1-Oct-96	132.6	First Trading Day of the Month
1-Nov-96	116.0	First Trading Day of the Month
2-Dec-96	110.9	First Trading Day of the Month

23-Dec-96	***96.5***	***1996 Index Low***
1-Jan-97	97.6	First Trading Day of the Month
14-Jan-97	***110.2***	***D, E, & F Block Auction Ends***
3-Feb-97	106.6	First Trading Day of the Month
3-Mar-97	95.9	First Trading Day of the Month
31-Mar-97	***88.8***	***FCC Suspends Installment Payments on C Block Notes***
1-Apr-97	87.5	First Trading Day of the Month
2-Apr-97	***84.0***	***1997 Index Low***
21-Apr-97	***87.1***	***FCC Files UCC – 1 Financing Statements***
1-May-97	86.3	First Trading Day of the Month
2-Jun-97	100.9	First Trading Day of the Month
1-Jul-97	125.4	First Trading Day of the Month
1-Aug-97	145.5	First Trading Day of the Month
1-Sep-97	154.3	First Trading Day of the Month
1-Oct-97	173.5	First Trading Day of the Month
9-Oct-97	***186.2***	***1997 Index High***
3-Nov-97	168.1	First Trading Day of the Month
1-Dec-97	162.2	First Trading Day of the Month
1-Jan-98	159.5	First Trading Day of the Month
2-Feb-98	170.3	First Trading Day of the Month
2-Mar-98	174.6	First Trading Day of the Month
1-Apr-98	199.4	First Trading Day of the Month
3-Apr-98	***201.3***	***1998 Index High***
1-May-98	176.7	First Trading Day of the Month
1-Jun-98	146.5	First Trading Day of the Month
8-Jun-98	***152.0***	***NextWave Files Voluntary Petitions***
1-Jul-98	164.7	First Trading Day of the Month
3-Aug-98	158.1	First Trading Day of the Month
1-Sep-98	123.8	First Trading Day of the Month
1-Oct-98	114.5	First Trading Day of the Month
7-Oct-98	***107.5***	***1998 Index Low***
2-Nov-98	130.8	First Trading Day of the Month
1-Dec-98	141.9	First Trading Day of the Month

16-Dec-98	***143.7***	***FCC Files proof of Claim with the Bankruptcy Court***
23-Dec-98	***144.5***	***FCC Announces C, D, E, & F Block Reauction***
1-Jan-99	175.5	First Trading Day of the Month
4-Jan-99	***178.9***	***1999 Index Low***
1-Feb-99	234.1	First Trading Day of the Month
1-Mar-99	223.9	First Trading Day of the Month
23-Mar-99	***274.1***	***C, D, E, & F Block Reauction Begins***
1-Apr-99	315.5	First Trading Day of the Month
14-Apr-99	***313.6***	***C, D, E, & F Block Reauction Ends***
3-May-99	312.6	First Trading Day of the Month
12-May-99	***322.9***	***Bankruptcy Court Makes Fradulent Transfer Ruling***
1-Jun-99	302.9	First Trading Day of the Month
1-Jul-99	400.0	First Trading Day of the Month
2-Aug-99	429.3	First Trading Day of the Month
10-Aug-99	***384.2***	***FCC & Nextel Agree to Term Sheet to acquire NW Spectrum***
1-Sep-99	439.7	First Trading Day of the Month
14-Sep-99	***513.3***	***FCC Files 2d Circuit Brief***
1-Oct-99	574.5	First Trading Day of the Month
1-Nov-99	682.7	First Trading Day of the Month
		2d Circuit Oral Argument
1-Dec-99	770.9	First Trading Day of the Month
22-Dec-99	***813.0***	***2d Circuit Decision Reversing Bankruptcy Court***
27-Dec-99	***858.3***	***1999 Index High***
3-Jan-00	830.0	First Trading Day of the Month
10-Jan-00	***792.6***	***NextWave Offers to Pay FCC Full Amount Owed***
12-Jan-00	***790.4***	***FCC Announces Cancellation of the NW Licenses and the Reauction of the C & F Block***
1-Feb-00	879.1	First Trading Day of the Month
1-Mar-00	948.5	First Trading Day of the Month

27-Mar-00	***1094.8***	***2000 Index High***
3-Apr-00	1017.3	First Trading Day of the Month
1-May-00	894.3	First Trading Day of the Month
1-Jun-00	784.1	First Trading Day of the Month
3-Jul-00	892.7	First Trading Day of the Month
1-Aug-00	845.0	First Trading Day of the Month
1-Sep-00	796.4	First Trading Day of the Month
2-Oct-00	599.4	First Trading Day of the Month
1-Nov-00	579.2	First Trading Day of the Month
1-Dec-00	419.2	First Trading Day of the Month
12-Dec-00	***484.4***	***Reauction of the C & F Block Begins***
28-Dec-00	***363.3***	***2000 Index Low***
1-Jan-01	372.2	First Trading Day of the Month
23-Jan-01	***535.2***	***2001 Index High***
26-Jan-01	***488.6***	***Reauction of the C & F Block Ends***
1-Feb-01	544.9	First Trading Day of the Month
1-Mar-01	387.0	First Trading Day of the Month
2-Apr-01	297.2	First Trading Day of the Month
1-May-01	386.1	First Trading Day of the Month
1-Jun-01	318.0	First Trading Day of the Month
2-Jul-01	342.3	First Trading Day of the Month
1-Aug-01	357.6	First Trading Day of the Month
3-Sep-01	311.7	First Trading Day of the Month
1-Oct-01	300.0	First Trading Day of the Month
31-Oct-01	***261.4***	***2001 Index Low***
1-Nov-01	274.3	First Trading Day of the Month
3-Dec-01	300.3	First Trading Day of the Month
1-Jan-02	293.9	First Trading Day of the Month
2-Jan-02	***298.9***	***2002 Index High***
1-Feb-02	190.1	First Trading Day of the Month
1-Mar-02	118.3	First Trading Day of the Month
4-Mar-02	***118.7***	***FCC's Petition for Certiorari Granted***
1-Apr-02	138.3	First Trading Day of the Month
1-May-02	144.4	First Trading Day of the Month

3-Jun-02	119.7	First Trading Day of the Month
14-Jun-02	***73.1***	***2002 Index Low***

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135D